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IN THE

Supreme Court of the United States

No. 766

CLIFFORD J. HYNNING,
Petitioner,

v.

DANIEL PARTRIDGE, III
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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The petitioner, Clifford J. Hynning, prays that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The memorandum and judgment of the District Court, dated respectively October 16 and 25, 1963, are printed as Appendix B, infra pp. 15. The Judgment of the Court of Appeals was entered on June 11, 1964, (Appendix C). A petition for rehearing was denied on September 18, 1964.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (2).

QUESTIONS PRESENTED FOR REVIEW

1. Whether under Rule 56 (c) of the Federal Rules of Civil Procedure, a reviewing Court of Appeals, in reversing the District Court's entry of summary judgment for the petitioner, could properly remand the case for the entry of summary judgment for the respondent upon a recitation of facts by the Court of Appeals which was materially at variance with the facts recited in the record before the trial court and upon the interjection by the Court of Appeals of a purported finding of credibility.

2. Whether the appellate opinion of reversal exhibits such a mechanical style of judicial reasoning as to conflict with the recognized methods of this Court in deciding contract disputes?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case involves Rule 56 (c) of the Federal Rules of Civil Procedure, which is printed in Appendix A, infra, p. 14.

STATEMENT OF THE CASE

This is a suit for declaratory judgment and specific performance (together with damages) of a clause for the subordination of a purchase-money mortgage in a contract for the sale of commercial real estate. It comes to this Court from the reversal of the judgment of the District Court (Appendix B), which had granted petitioner's cross-motion for summary judgment and denied respondent's motion for summary judgment and cross-claim for attorney's fees. Petitioner's motion in the District Court was supported by written exhibits, affidavit (R. 45-50)[1] and

[1] References to the record "(R. ——)" are to the Joint Appendix as printed in the appellate court.

a deposition of co-defendant Sadd, who had acted as a broker in negotiating the contract between the parties (R. 14), and who was also a co-trustee under the deed of trust of the purchase-money mortgage.

Petitioner was the purchaser (hereinafter sometimes called purchaser) and respondent was the seller (hereinafter sometimes called seller) under a contract dated June 30, 1961 (R. 7-12). The properties sold were two near-century old residences at 1903 and 1905 N Street, N. W., Washington, D. C. (hereinafter called the N Street properties), which in the last decades had been used as low rental apartments. Their location near Dupont Circle furnished a business opportunity for remodeling into professional offices. The broker[2] stated that the seller would be willing to subordinate his purchase-money lien to the full cost of remodeling into a modern office building (R. 16-17, 46).

On or about May 29, 1961, the broker prepared for the purchaser a written offer of $95,000.00 on the condition, inter alia, that the seller take a purchase-money mortgage for the amount over a cash payment of $12,000,[3] and the outstanding mortgage and that the "Seller agrees to subordinate his trust to a new first trust to be obtained for the purpose of remodeling the properties" (R. 46, Para. 3). The seller made a counter offer at $103,000.00, including an agreement, inter alia, "to subordinate this trust to a new first-trust to be obtained for *the purpose of remodeling the property, provided the entire net proceeds thereof be devoted to such remodeling*" (underscoring

---

[2] Codefendant Sadd admitted before this litigation started that he understood . . . "that it was agreeable to the seller to subordinate to a first mortgage providing the amount did not exceed the existing mortgages and the cost of remodelling" (R. 14); and this admission was reaffirmed under oath by Sadd at his deposition (R. 19).

[3] A cash payment of $12,000 on a sale for $97,500, obviously qualified the transaction for installment sales treatment under the Federal income tax laws.

added) (R. 46, para. 4). While the price of $103,000 was too high, the seller's provis was readily acceptable to the purchaser so long as he was assured of subordination to the extent of the actual cost of remodeling. The parties finally agreed on a price of $97,500.00 and the following subordination clause:

> . . . second deferred purchase money deed of trust may be subordinated in lien to a new first trust to be obtained in connection with the refinancing of the existing mortgage and the remodeling of the properties, provided an amount equal to the entire net proceeds to be used for the remodeling (R. 10).

An integral part of the consideration for the purchase of the N Street properties for $97,500 was the express obligation of the seller to subordinate his purchase-money deed of trust to new financing to be obtained in connection with the existing mortgage (which the purchaser assumed) without regard to the nature, amount or timing of such subordination, except that the net proceeds could be used only for remodeling purposes. It was only through subordination to the remodeling that the full economic potential of the N Street Properties could be realized for the benefit of both the seller and the purchaser.

Both parties fully realized that it was impossible at the time of sale to determine the actual costs of remodeling the N Street Properties from apartment use into a professional office building. Such costs depended on many variable factors; such as the possible need to provide off-street parking (in which case a special option was given the purchaser to use a neighboring property owned by the seller), the preparation of detailed drawings and specifications by architects and engineers, the obtaining of a building permit, the negotiated settlement of existing leases executed by the seller which extended into the anticipated remodeling period, the letting of remodeling contracts, the arrangements for a construction loan, the

completion of the remodeling process, the obtaining of an occupancy permit, and the final auditing of remodeling costs by an independent accountant (R. 46-47). This process of remodeling was long, involved, and tedious, ranging over a year in time and attended with many obstacles and uncertainties.

Thus neither at the time of the contract of sale (June, 1961) nor at the time of settlement (September, 1961),[4] could either the seller or purchaser know the extent of the remodeling, the length of time required or the total dollar cost of the remodeling. Consequently the seller placed no limit on the amount of subordination in terms of the nature of the remodeling, its cost, or the time or times of subordination except that the net proceeds of the new financing be used for the remodeling of the N Street properties.

To finance the course of remodeling, the purchaser obtained a "Construction loan" [5] from the Perpetual Building Association (hereinafter called Perpetual) in the amount of $132,500.00, to which the seller subordinated on March 15, 1962. This loan was a combination construc-

---

[4] On September 7, 1961, title and possession were settled. The purchase-money deed of trust (R. 29-34) provided

> Said land and premises are now subject to a prior First-Trust lien. The holder of said note and the parties hereto agree that the lien created by this Trust may be subordinated to a new First Trust, provided the entire net proceeds thereof be used to pay the balance due on the present First-Trust and the remodeling of the improvements on said land. The Trustee or Trustees acting hereunder shall execute *such further instruments* as may be desirable to effectuate this right of subordination (Emphasis added) (R 34).
>
> While the purchaser has not made a major point out of the use of the singular or the plural, it should be noted that the term "instruments" was used in the plural.

[5] So designated by both seller and purchaser at the time of settlement of Perpetual's loan (Exhibit E to appellant's affidavit R. 40).

tion loan and long-term financing which was carried by Perpetual on an open basis, i.e., if the completed building would warrant a larger loan Perpetual might increase the loan. Approximately $18,000 was used to retire the outstanding first mortgage, $2,371 was applied to loan fees and settlement costs, leaving approximately $112,129 of the net proceeds of the construction loan available for remodeling. As is frequently the case in the remodeling of an older building designed for one purpose (residential) into an entirely different use (office), actual remodeling costs substantially (approximately $37,000) exceeded the net proceeds of the construction loan as determined upon auditing by an independent CPA.

The purchaser upon the completion of the remodeling, requested Perpetual, which had carried the construction loan on an open basis, to increase the loan if a reappraisal of the completed office building would so warrant. Meanwhile, however, the Congress had changed the law applicable to the taxation of the savings and loan industry in a manner that adversely affected Perpetual's commercial loans as distinguished from its portfolio of residential loans. Perpetual consequently decided as a matter of policy not to make any further commercial loans at that time but agreed in writing to permit the pay-off of its loan to purchaser (R. 48-49).

The purchaser thereupon applied for refinancing to The Riggs National Bank (hereinafter called Riggs), which on the basis of an appraisal of the property at $265,000, offered to make a first trust loan at 5½ percent interest in the amount of $176,000 (R. 49-50). However, the purchaser requested the seller to subordinate to the proposed Riggs financing, reduced in amount to cover only the actual cost of remodeling in excess of the net proceeds of Perpetual's construction loan. When the seller refused, the purchaser sued.

The issue in the District Court was phrased by the purchaser as follows:

> The issue is whether the contract of sale of June 30, 1961, (Exhibit A of the complaint), obligates defendant Partridge to subordinate his purchase-money lien to plaintiff's financing of the actual cost of remodeling certain old apartments of the N Street properties into a modern professional office building or whether defendant's obligation could be, and was, discharged short of that.

The suit in the District Court was decided in the purchaser's favor upon cross-motions for summary judgment. The District Court held that the seller "was required to subordinate his second deferred purchase money deed of trust to the total amount required for the refinancing of the then existing mortgage and for the remodeling of the properties," and also denied respondent-seller's counterclaim for attorney's fees (Appendix A).

REASONS FOR GRANTING THE WRIT

The Court of Appeals (Appendix B) has held:

(a) That by subordinating to the "permanent financing" obtained from Perpetual in the form of a "new first trust" the seller had complied with his contract and should not be forced to subordinate a second time.

(b) That the purchaser had claimed that the Perpetual financing was a construction loan only and that later permanent financing was contemplated after the cost of remodeling had been determined, and that such claim by the purchaser was "belied by the facts."

The case was not only reversed but remanded with a direction to the District Court for the "entry of summary judgment in favor of" the seller. The resulting decision is in conflict with many decisions of this Court under

Rule 56 of the Federal Rules of Civil Procedure, with many decisions of other Circuit Courts of Appeal as well as with decisions of the Court of Appeals.

Our reasons in detail are:

1. The Court of Appeals violated Rule 56 (c) by remanding the case for the entry of summary judgment for the seller, in an opinion stating facts materially at variance with the facts stated in record before the trial court.

2. By reversing the trial court's interpretation of a commercial contract, without even a cursory examination, so far as the published opinion discloses, of the reasoning and findings of the trial court and by its studied lack of awareness of or interest in the "purpose of the contract" and the circumstances surrounding its execution, the Court of Appeals exhibited a mechanical style of judicial reasoning which is in conflict with the prevailing methods of judicial interpretation of contracts and has so far departed from the accepted and usual course of judicial proceedings as to call for exercise of this court's power of supervision.

An appellate remand for the entry of summary judgment for the appellant violates Rule 56(c) where the facts stated by the appellate court were (a) in substantial variance with the record before the trial court and (b) involved a material issue of credibility.

This argument addresses itself to the point that the appellate court erred in remanding the case for the entry of summary judgment for the appellant. It assumes that the test of the validity of the entry of summary judgment is the same whether such judgment be entered by the trial court itself or upon direction of the appellate court. It is submitted that summary judgment is improper wherever

material facts are in issue. *Fountain* v. *Filson*, 336 US 681, 69 S. Ct. 754, 93 L. Ed. 971 (1949); *Kennedy* v. *Silas Mason Co.*, 334 US 249, 68 S. Ct. 1031, 92 L. Ed. 1347 (1948); *Poller* v. *Columbia Broadcasting System*, 368 US 464, 4 L. Ed. 458 (1962); *United States* v. *Diebold*, 369 US 654, 82 S. Ct. 993, 8 L. Ed. 176 (1962); and 6 *Moore Federal Practice* ¶ 56.16. Summary judgment is particularly improper where there are material issues of credibility. *Sartor* v. *Arkansas Natural Gas Corp.*, 321 US 620, 64 S. Ct. 724, 88 L. Ed. 967 (1955).

The nub of the appellate decision is in its penultimate paragraph of the opinion where the issue was drawn as follows (Appendix C, *infra*, p. 21):

> "Hynning's position is that Partridge's agreement to subordinate his lien 'to a new first trust' was not met when the latter subordinated to the Perpetual deed of trust on March 15, 1962, because he claims the Perpetual financing was a construction loan only, and that later permanent financing was contemplated after the cost of remodeling had been determined."

This was not Hynning's position either in the trial court, the appellate court, or at any time or any place, in this record (R. 3-5, 46-49). The purchaser had never characterized the Perpetual financing as a construction loan *only*, (R. 3-5, 46-49). His claim has always been that the seller had agreed to subordinate to the total cost of remodeling and that such obligation was unaffected whether the Perpetual financing was labeled a construction loan, permanent financing or however it might be labeled.

Upon this misstatement of Hynning's position, the appellate court, in this same paragraph and in the succeeding sentence refuted this factual contention and raised an issue of credibility by stating:

> ". . . . . is *belied* by the fact that the Perpetual loan, although it provided for advancements as the reconstruction progressed, was to run 18 years and could not be paid off before *March 15, 1967*". (Emphasis added)

Again the record shows that while the loan was for 18 years, it was administered on an open basis during the construction period, infra, and that the loan could be paid off before March 15, 1967 (R. 49).

In the succeeding sentence, the appellate court, then concluded as a matter of law, on the "claim" recited and the "evidence", stated that:

> "Thus, the Perpetual loan was not merely a temporary construction loan, but was permanent financing, and Perpetual's deed of trust was 'a new first trust' to which Partridge was subordinated, as agreed in the contract of sale." (Slip Opinion, p. 3, Appendix C)

The appellate court also said that the purchaser "simply estimated his costs when he negotiated the Perpetual loan . . . and found that he had grossly under-estimated his costs." The purchaser stated on the record that the cost of remodeling could not be determined until the remodeling was completed and gave various factors why this was so. (R. 46-49). The seller confirmed that at the time of the negotiations and of the sale and the execution of the contract the plans and specifications were incomplete. The trial court found that there was no dispute as to fact that the remodeling had cost more than net proceeds of the Perpetual financing (R. 54) and made no reference to "simple estimates" or "gross underestimate".

The appellate court's interpretation of the contract exhibited a mechanical style of judicial reasoning in that (a) the court disregarded the clear and undisputed purposes of the contract, which were not in dispute and (b) the court bottomed its decision on its grammatical read-

ing of the one-letter indefinite article "a". This argument addresses itself to the point that this case was properly decided by the trial court and the appellate reversal was an erroneous interpretation of the contract.

The Court of Appeals bottomed its construction of a commercial contract on the one-letter indefinite article "a," as found in a subordination clause, supra, p. 4.

The Court of Appeals held that the seller "should not be forced to subordinate a second time, "notwithstanding the reasoning of the trial court, which had held:

> . . . that the seller was required to subordinate his second deferred purchase money deed of trust to the total amount required for the refinancing of the then existing mortgage and for the remodeling of the properties. The only limitation in this regard was that the net proceeds from the new first trust should be used for the remodeling.
>
> It is conceded that the defendant has not subordinated his second deferred purchase money deed of trust to the total financing required for the remodeling of the building, and it is the opinion of the Court that he should be required to do so in accordance with the terms of the agreement. (Appendix B)

The Court of Appeals, in its construction of the contractual obligation of the seller to subordinate, displayed no awareness of or interest in the purpose of the contract and the circumstances surrounding its execution, to-wit, the function of a subordination obligation of the seller in facilitating the sale of downtown real property requiring extensive improvements in order for it to yield an income which would justify the sales price and without which the sale could not have been consummated between the parties. Only by agreeing to subordinate the purchase-money mortgage to the new financing of remodeling was the

seller enabled to secure a sales price predicated upon the potential use of the property as remodeled. The utter silence of the court on the purpose and circumstances of the contract (including the successive versions of the subordination clause in the course of the negotiations of the parties) is in strong contrast with the style of judicial reasoning employed by this court since its earliest days. *Nash* v. *Towne*, 5 Wall. (U.S.), 689, 19 L. Ed. 527 (1866); *Bradley* v. *Steam Packet Co.*, 13 Pet. (U.S.) 89, 10 L. Ed. 72 (1839); Also see 3 *Corbin on Contracts* § 536; 2 *Powell on Real Property*, § 317; *Restatement of the Law of Property*, § 241; and *Restatement of the Law of Contracts*, § 235d. The intentions of the contracting parties have been frustrated by the Court's reversal, which turned a serious commercial undertaking into a guessing game.

The only tests cited by the Court of Appeals with respect to the subordination obligation of the seller are in terms which are found nowhere in the contract of sale, such as "a temporary construction loan", "permanent financing," "[the purchaser] simply estimated its [remodeling] cost," and "[the purchaser] grossly underestimated its [remodeling] cost."

The Court of Appeals did not even deign to mention the test specifically applied by the trial court to the subordination obligation of the seller-to-wit, the only limitation found on the subordination clause in the contract of sale, that the net proceeds from the new first trust should be used for the remodeling, as set forth in supra, p. 4.

CONCLUSION

The issues presented on this petition are both procedural and substantive and are important to the prompt and just decision of disputes over commercial contracts. If the remand of the Court of Appeals for the entry of summary judgment is permitted to stand, the elemental basis of that summary technique under the Federal Civil Rules would be undermined, for Rule 56(c) presupposes no contradiction of material facts. If a contract can be interpreted solely in terms of the single-letter indefinite article "a" and without regard to the purposes of the parties and the circumstances giving rise to the contract, an exhibit of the formalistic style of deciding appeals would be sanctioned anew. The proper use of mortgage subordination is an important financial technique in facilitating commercial development of urban and suburban real estate.

For the foregoing reasons, it is respectfully submitted that a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

FEDERAL RULES OF CIVIL PROCEDURE
RULE 56. SUMMARY JUDGMENT

* * * *

(c) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

APPENDIX B

[Filed October 16, 1963]

MEMORANDUM

By their cross-motions for summary judgment and at the arguments on said motions, counsel for the parties urged that there is no genuine issue of material fact and that the only question for the Court to determine is one of law involving the interpretation of a provision of the contract filed as Exhibit A to the complaint herein which reads as follows:

> "Seller agrees that this second deferred purchase money deed of trust may be subordinated in lien to a new first trust to be obtained in connection with the refinancing of the existing mortgage and the remodeling of the properties, provided an amount equal to the entire net proceeds be used for the remodeling."

The Court is of the opinion that the seller was required to subordinate his second deferred purchase money deed of trust to the total amount required for the refinancing of the then existing mortgage and for the remodeling of the properties. The only limitation in this regard was that the net proceeds from the new first trust should be used for the remodeling.

It is conceded that the defendant has not subordinated his second deferred purchase money deed of trust to the total financing required for the remodeling of the building, and it is the opinion of the Court that he should be required to do so in accordance with the terms of the agreement.

There being no genuine issue of material fact and the Court being of the opinion that, as a matter of law, the plaintiff is entitled to judgment, the defendant's motion

for summary judgment will be denied and the plaintiff's cross-motion for summary judgment will be granted.

Counsel for plaintiff will submit an order in accordance with the foregoing.

/s/ Joseph C. McGarraghy
Judge

October 16, 1963

[Filed October 25, 1963]

JUDGMENT

This cause came on to be heard on a motion of defendant Partridge for summary judgment and on a cross-motion of plaintiff for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the court having considered the pleading in the action, the deposition of defendant Sadd, the affidavits filed by or on behalf of the parties, and the court having heard oral argument and having found that there is no genuine issue as to any material fact and having concluded that plaintiff as a matter of law is entitled to judgment declaratory of his rights under the contract with defendant Partridge, dated June 30, 1961, as well as for specific performance of the subordination clause of said contract and for such amount as shall be due him as damages, it is hereby

ORDERED, plaintiff's motion for summary judgment is in all respects granted, defendant's motion for sum-

mary judgment be and the same hereby is denied, defendants' counter-claims are hereby denied, with costs and disbursements to be taxed by the clerk in favor of plaintiff and against defendant, and it is further

ORDERED, ADJUDGED AND DECREED

1. The contract of sale between defendant Partridge as seller and plaintiff as buyer, dated June 30, 1961, required the seller to subordinate his second deferred purchase-money deed of trust to the total amount required for the refinancing of the then existing mortgage and for the remodeling of the properties, subject only to the limitation that the net proceeds from the new first trust should be used for the remodeling.

2. That defendant has not subordinated his second purchase-money deed of trust to the total financing required for the remodeling of the building; and defendant Partridge hereby breached said contract in refusing, upon plaintiff's request in April, 1963, to subordinate his second purchase-money deed of trust, dated September 5, 1961, to a new first trust loan by The Riggs National Bank, covering the total amount required for the refinancing of the existing mortgages and for the remodeling of the properties.

3. Defendants Partridge, Sadd, and Smoot are hereby ordered and directed forthwith to subordinate the said second purchase-money deed of trust dated September 5, 1961, in the then face amount of $66,971.63, to a new first trust loan to be made by The Riggs National Bank in the amount of $163,724.00.

4. By the stipulation of the parties but without prejudice to the right of defendant Partridge to appeal and to contest the award of said damages in case of reversal,

damages are assessed against defendant Partridge in the amount of $1,000 as of the date of this judgment.

/s/ Joseph C. McGarraghy
United States District Judge

SEEN

/s/ Philip F. Herrick

Dated: October 25, 1963

[Filed November 5, 1963]

NOTICE OF APPEAL

Notice is hereby given that Daniel Partridge III, one of the defendants above-named, hereby appeals to the Court of Appeals for the District of Columbia from that part of the final judgment entered in this action of the 25th day of October, 1963, in favor of the plaintiff and against the defendants.

DATED: November 1, 1963

/s/ Philip F. Herrick
Attorney for Appellant

* * *

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,264

DANIEL PARTRIDGE III, as Trustee
u/w Grace S. Partridge, APPELLANT

v.

CLIFFORD J. HYNNING, etc., APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided June 11, 1964

Mr. Philip F. Herrick for appellant.

Mr. Clifford J. Hynning, with whom *Mr. Lawrence C. Moore* was on the brief, for appellee.

Before WILBUR K. MILLER, DANAHER and BASTIAN, *Circuit Judges.*

WILBUR K. MILLER, *Circuit Judge*: By a contract dated June 30, 1961, Daniel Partridge III sold and agreed to convey two old residences, which he owned as a testamentary trustee, to Clifford J. Hynning, who desired to convert them into a single office building. Hynning was to assume a mortgage debt of about $20,000 and execute a note to Partridge for about $65,000 secured by a second deed of trust. The contract contained this provision:

> ". . . Seller [appellant] agrees that this second deferred purchase money deed of trust may be sub-

> ordinated in lien to a new first trust to be obtained in connection with the refinancing of the existing mortgage and the remodeling of the properties, provided an amount equal to the entire net proceeds be used for the remodeling. . . ."

Pursuant to this arrangement, on September 5, 1961, Partridge conveyed the property to Hynning who in turn executed and delivered to Partridge his note for $66,971.63 and a deed of trust to secure it. During the work of remodeling, on March 15, 1962, Hynning obtained a loan of $132,500 from Perpetual Building Association to retire the mortgage he had assumed and to pay for the remodeling. This was an 18-year loan secured by a deed of trust. On the same day, Partridge subordinated his purchase money deed of trust to Perpetual's lien, as he had agreed to do.

It turned out that the cost of reconstruction exceeded Perpetual's loan by approximately $37,800. Hynning obtained from Riggs National Bank a commitment to lend $176,500 on the property which would cover Perpetual's debt [1] and the excess cost of construction, but which would require that Partridge subordinate his lien to the deed of trust to be executed to Riggs to secure the new and larger loan.

On April 10, 1963, more than a year after Partridge had subordinated his lien to Perpetual's, Hynning asked Partridge to make a second subordination to the proposed Riggs deed of trust. Partridge refused, and on May 9, 1963, Hynning brought this suit, asking the District Court to declare that Partridge had breached his agreement to subordinate and to order him to subordinate his

---

[1] Perpetual agreed that, for a consideration, it would accept payments of its loan, although it had been agreed that full payment could not be made in the first five years of its 18-year term, and in the second five years only by paying a premium for the privilege.

lien to that of a new deed of trust securing a larger amount than that borrowed from Perpetual.

The cause was submitted to the District Court on cross motions for summary judgment, and that court granted judgment to Hynning in accordance with the prayer of his complaint, and also judgment against Partridge for $1,000 damages. Partridge appeals.

Hynning's position is that Partridge's agreement to subordinate his lien "to a new first trust" was not met when the latter subordinated to the Perpetual deed of trust on March 15, 1962, because he claims the Perpetual financing was a construction loan only, and that later permanent financing was contemplated after the cost of remodeling had been determined. This is belied by the fact that the Perpetual loan, although it provided for advancements as the reconstruction progressed, was to run 18 years and could not be paid off before March 15, 1967. Thus, the Perpetual loan was not merely a temporary construction loan but was permanent financing, and Perpetual's deed of trust was "a new first trust" to which Partridge subordinated, as agreed in the contract of sale.

It is apparent that Hynning did not have a firm contract for the remodeling work but simply estimated its cost when he negotiated the Perpetual loan. Then, when the work was finished and he found he had grossly underestimated its costs, he sought to require Partridge to share the additional burden. We hold that Partridge complied with his contract and should not be forced to subordinate a second time. Consequently, the judgment will be reversed and the cause will be remanded for the entry of summary judgment in favor of Partridge.

So ordered.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The question here is one of interpretation of a private contract between private individuals relative to property located in the District of Columbia.

On June 30, 1961, respondent sold two residences on N Street, N. W., Washington, D. C., which he owned

as testamentary trustee, to petitioner, who desired to convert them into an office building (R. 61). Petitioner paid for the property partly in cash, partly by assuming an existing mortgage (R. 7), and partly by giving respondent a purchase money deed of trust, and respondent agreed to subordinate his purchase money deed of trust to a new first trust to be obtained by petitioner for the purpose of remodeling, provided the entire net proceeds of the new trust be devoted to the remodeling (R. 10).

On March 15, 1962, petitioner obtained a loan of $132,500 (R. 35) from Perpetual Building Association, and on the same day respondent subordinated his purchase money deed of trust to the trust securing the new loan (R. 36-39). The new loan ran for 18 years, and the note provided, "Loan not to be paid off during the first five-year period" (R. 35-6). Petitioner's remodeling costs exceeded the net proceeds of his loan by about $37,800 (R. 62). In April 1963, after the remodeling was completed he asked respondent to subordinate again, this time to a new and larger trust loan which would include the amount of the existing first trust plus the amount of the excess costs (R. 13). Respondent refused becouse he thought it unwise to reduce the security for the second trust loan (R. 13). The Court of Appeals unanimously held that respondent complied with his agreement when he subordinated on March 15, 1962 and that the contract did not require him to subordinate again (R. 61-63).

Thus the issue is purely one of local law, and it has been decided by the highest court of the local jurisdiction. Cf. *Griffin* v. *United States*, 336 U.S. 704, 717-8 (1949). reh. den. 337 U.S. 921 (1949).

ARGUMENT

I. The Court of Appeals Has Not Violated Rule 56.

Petitioner seeks to inject a federal flavor by contending that the Court of Appeals violated Rule 56 of the Federal Rules of Civil Procedure. The Court, he alleges, (1) stated facts materially at variance with the facts of record and (2) brought in an issue of credibility. Respondent replies that the Court did neither of these things.

(1) The matter came before the trial court on cross motions for summary judgment. The parties agreed before the trial court that the case involved only an issue of law (R. 93). The trial court interpreted the contract as requiring respondent to subordinate to the total amount required for remodeling and therefore directed him to subordinate a second time (R. 55). The Court of Appeals reversed, and held that respondent's subordination of March 15, 1962 fulfilled his contract obligations (R. 63). Thus, the Court of Appeals has decided a question of local contract law.

Petitioner points particularly to the penultimate paragraph of the Court of Appeals' decision (R. 63). That paragraph reads:

> "Hynning's [petitioner's] position is that Partridge's [respondent's] agreement to subordinate his lien 'to a new first trust' was not met when the latter subordinated to the Perpetual deed of trust on March 15, 1962, because he claims the Perpetual financing was a construction loan only, and that later permanent financing was contemplated after the cost of remodeling had been determined. This is belied by the fact that the Perpetual loan, although it provided for advancements as the reconstruction progressed, was to run 18 years and

> could not be paid off before March 15, 1967. Thus, the Perpetual loan was not merely a temporary construction loan but was permanent financing, and Perpetual's deed of trust was 'a new first trust' to which Partridge subordinated, as agreed in the contract of sale."

Petitioner contends that the Court misstated his position by injecting the word "only" in the first sentence of the quoted paragraph (Petition, p. 9). In this sentence the Court paraphrased petitioner's position. The paraphrasing is completely fair. In six places in his complaint (R. 3, 4, 5) petitioner characterizes his $132,500 loan as a construction loan. It is true that he does not call it a construction loan "only," but neither does he call it anything else. And if the word "only" is omitted from the opinion the sense is not changed. Also in his complaint petitioner quotes the broker as saying that it is customary on remodeling jobs to obtain first a construction loan and then to replace it with a permanent loan (R. 5). It is difficult, therefore, to fault the Court's statement of petitioner's position.

The Court then states that petitioner's position is erroneous because the $132,500 loan was to run for 18 years and could not be paid before March 15, 1967. The Court says that the loan was a permanent loan and that the trust which secured it was "a new first trust" within the meaning of the contract between petitioner and respondent (R. 63). The loan was in fact an 18-year loan, and by its express terms it could not be paid off for five years from March 15, 1962 (R. 35-6). It is true that the parties to the loan agreement, like any contracting parties, could always change their contract by a later agreement, supported by consideration, but

that does not alter the fact that the loan, as the note was written, expressly provided that it could not be paid off for five years. If it was true the lender administered the loan on an open basis during the construction period (see R. 49), it is equally true that this was no communicated to respondent (R. 53), that respondent was not a party to any understanding in that regard, and that respondent understood he was subordinating to a construction loan and relied on that fact (R. 28-29).

Nomenclature is not important. The crux of the matter is that respondent agreed to subordinate to a new first trust to be obtained in connection with the remodeling, that petitioner obtained such a loan, secured by a deed of trust, which was to run for 18 years and which could not by its terms be paid off for the first five years, and that respondent subordinated to it. Respondent did not contemplate any further subordination, nor did he have any reason to do so, and the Court of Appeals has correctly decided a question of local contract law.

Petitioner also points to the last paragraph of the Court's opinion, wherein the Court said that apparently petitioner did not have a firm contract for the remodeling work but simply estimated his costs and later found that he had underestimated (R. 63). This is no more than a fair comment on the record.

(2) The Court of Appeals did not inject an issue of credibility. It had no need to do so, because the documents speaks for themselves. It held simply that by his subordination of March 15, 1962 respondent had subordinated to the "new first trust" specified in his original agreement with petitioner. The parties them-

selves, by their cross motions for summary judgment and by their statements to the trial court that the only issues before it were issues of law (R. 93), reduced the case to an interpretation of the documents, pleadings and affidavits, and to the extent that there were any conflicting facts in the affidavits the parties in effect told the trial court that any such conflicts were unimportant and should be disregarded.

II. The Argument That the Court of Appeals Exhibited a Mechanical Style of Reasoning.

Petitioner criticizes the Court of Appeals for exhibiting what he calls a mechanical style of judicial reasoning (Petition, p. 8), but as he himself points out, this argument is addressed to the Court's allegedly erroneous interpretation of the contract (Petition, p. 11). Petitioner does not claim that this is one of the "exceptional situations where egregious error has been committed" in deciding a local question (see Griffin v. U.S., *supra*, at page 718). Actually the decision below seems clearly correct. Further, it relates purely to a matter of local, private contract law, and it turns on its own narrow facts and can affect few, if any, other people.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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